Bench Bar

Friday, May 9, 2014

Chapter 13 and Hot Topics

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I. CASES OF INTEREST

APPLICABLE COMMITMENT PERIOD (ACP)

A. ABOVE MEDIAN DEBTOR WITH NEGATIVE DISPOSABLE INCOME - - - - - - - -

60 OR 36 MONTH PLAN?

In Re Brady, 361 B.R. 765, 776-77 (Bankr. D.N.J. Feb. 13, 2007)

If the debtors have no disposable income to apply to unsecured creditors' claims, then the length of the applicable commitment period is irrelevant. Negative disposable income per 22C, 36 month plan payments.

Maney v. Kagenveama In Re Kagenveama, 541 F.3d 868, 875-77 (9th Cir. June 23, 2008)

Applicable commitment period is a temporal measurement, but debtor with no projected disposable income has no applicable commitment period.

Coop v. Frederickson (In Re Frederickson), 545 F. 3d 652, 659-60 (8th Cir. Oct. 27, 2008)

Chapter 13 debtor with CMI greater than applicable median family income, even when disposable income on Form B22C is negative, applicable commitment period is temporal, is 60 months and no plan can be confirmed unless it extends for entire 60 month period.

Whaley v. Tennyson (In Re Tennyson), 611 F.3d 873, 877-79 (11th Cir. July 16, 2010)

Applicable commitment period in §1325 (b)(4) is temporal and defines minimum length of Chapter 13 plan that does not pay unsecured claims in full-without regard to projected disposable income.

Baud v. Carroll, 634 F.3d 327, 338-56 (6th Cir. Feb. 4, 2011)

Applicable commitment period is temporal, and upon objection, debtors with CMI greater than applicable median family income must propose a five-year plan without regard to whether there is positive, negative or no projected disposable income.

Danielson v. Flores (In Re Flores), 692 F.3d 1021, 1024-36 (9th Cir. Aug., 31, 2012

Allows debtor with no projected disposable income to confirm plan shorter than applicable commitment period (Kagenveama survived *Hamilton v. Lanning* as to this issue)

Danielson v. Flores (In re Flores), Case 11-55452 D.C. No. 6:10-29956-MJ (9th Cir 8/29/13 en banc)

Bankruptcy Court may confirm a Chapter 13 Plan under §1325 (a)(b)(1)(B) only if the plan's duration is at least as long as the applicable commitment period.

B. MODIFIED PLAN TO REDUCE PLAN PERIOD (ACP)

Original Plan above median 60 month --

May Modified Plan reduce to 36 month?

* * YES * *

In Re Davis, 439 B.R. 863 (Bankr. N.D. Ill. Dec. 16, 2010)

Modification of confirmed plan to reduce term from 60 to 36 months is approved when debtor sustained loss of income and separation from spouse; trustee's objection based on disposable income test is rejected because § 1329 (b) does not apply to post confirmation modifications. Debtor's income was now below applicable median, permitting three-year plan to meet good-faith and minimum plan term requirements.

* * NO * *

In Re Buck, 443 B.R. 463, 470 (Bankr. N.D. Ga. Nov 10, 2010) Applying Whaley v. Tennyson (In re Tennyson)

Debtors who had CMI greater than applicable median family income at confirmation cannot modify plan 40 months later to reduce applicable commitment period or length of plan from 60 months to 36 months; debtors can reduce the monthly payments to reflect lost income but must stay in Chapter 13 for entire 60 month period.

* * MAYBE * *

Mattson v. Howe (In Re Mattson), 468 B.R. 361, 372-73 (B.A.P. 9th Cir. Apr. 5, 2012)

Debtors failed to prove good faith with respect to shortening length of plan from 60 to 36 months. The continued absence from §1329(b)(1) of any reference to §1325(b) is conclusive as to whether a debtor may modify his or her plan to reduce the term below the applicable commitment period required for an original plan.

C. DEBTOR IS IN FOR 60 MONTHS ---

NOW MAY DEBTOR PAY OFF EARLY?

In Re Williams 2014 WL 274307

ISSUE: Whether §1325(b)(4)(B) applies to a modified plan where the debtor was above the median income at the outset of the case.

HOLDING: First, the applicable commitment period is in fact a durational requirement. Second, unless the debtors pay all creditors at 100%, the debtors must remain in the bankruptcy for the full 60 month term.

II. ISSUES OF INTEREST

100% V. DISPOSABLE INCOME

When a plan proposes to pay 100% of claims, are debtors able to pay less than their projected disposable income over the life of the plan, stretching out payments over 60 months?

11 U.S.C. §1325(b) subsection (b):

"(1) If the trustee or the holder of an allowed unsecured claim objects to the Confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."

In Re Jones, 374 B.R. 469, 471 (Bankr. D.N.H. Sept. 7, 2007)

When plan proposes to pay unsecured creditors in full consistent with §1325(b)(1)(A), plan need not satisfy projected disposable income test in §1325 (b)(1)(B).

In Re Richall, 470 B.R. 245, 249-50 (Bankr. D.N.H. May 11, 2012)

After BACPA, courts may deny confirmation of a Chapter 13 plan proposed by a below median debtor, which stretches beyond a three year period and pays creditors in full but does not commit all disposable income, because a court could find that no cause exists to extend the plan longer than three years when a debtor can payoff creditors within the commitment period. The same is not true for above median debtors…Above median debtors now have an election to either pay all of their disposable income for five years, or until creditors are paid in full, §1325(b)(1)(B), or to pay less than their disposable income over five years, if such lower payments will pay unsecured creditors in full. 11 U.S.C. §1325(b)(1)(A)…This result is contrary to the intent of Congress in enacting BAPCPA…It is the responsibility of Congress, not the courts, to correct the statute.

In Re Riddle, 410 B.R. 460, 463-64 (Bankr. N.D. Tex. Aug. 13, 2009)

When disposable income went down after confirmation because of lost overtime and increased medical expenses, plan can be modified to reduce dividend to unsecured creditors from 100% to 0% without violating good-faith test for modification of plan. ….The changes in Debtor's circumstances constitute valid reasons to seek a plan modification……The court is …..troubled…..by the loss to creditors of the difference between Debtors' disposable income and their plan payments during the first 15 months of their case….A step-up plan is inappropriate in cases such as this where the effect is solely to defer the pain of contributing the debtor's entire disposable income to performance of his or her plan…. The court ….will no longer routinely confirm plans like…the instant case.

III. TAX SALE CERTIFICATES

TAX SALE FORECLOSURE

In Re Berley Associates, Chapter 11 Case No: 12-32032 MBK, Adversary No: 12-2208

In a Chapter 11 case with Chapter 13 implications, Judge Kaplan held that a final judgment entered in a tax sale foreclosure action did not result in foreclosure proceedings with reasonable equivalent value. The Court determined that a transfer of title to tax sale certificate holder in a pre-petition tax sale and subsequent foreclosure where there was no competitive bidding, may constitute a fraudulent conveyance. Further, under §547, a Trustee may avoid the transfer, if such transfer was within the preference period and otherwise satisfied the statutory conditions.

(IN ACCORD: *In Re Varquez,* 13-30571 JHW, 2013.)

In Re Varquez, 502 B.R. 186 (Bankr. D.N.J. 2013) JHW

The Bankruptcy Court denied the debtors' challenge to the state court judgment under the Rooker-Feldman doctrine. However, the Bankruptcy Court looked at the transaction and indicated that the debtors could attack the judgment using the trustees' avoidance powers under 11 U.S.C. §522(g) and (h); finding constructive fraud focusing on §548, The Court distinguished a tax sale foreclosure of the debtor's equity of redemption under New Jersey state law, from a mortgage foreclosure sheriff sale because where there is no actual sale, no notice requirements to third parties.

In Re Princeton Office Park, LP, Chapter 11 Case No: 08-27149 MBK, 2014 (Princeton Office II)

In Re Princeton Office Park, LP, 423 B.R. 795 (Bankr. D.N.J. Feb 17, 2010) Affirmed by District Court 103021 (D.N.J. 2010. Certification of Question of Law presented to NJ Supreme Court #3-10-cv-03021, 3rd Cir., 2011) (Princeton Office I).

In Princeton Office I, Judge Kaplan, in another Chapter 11 case with Chapter 13 implications, held that the holder of a claim for a tax sale certificate did not have a tax claim and therefore, the interest on such claim may be modified.

(IN ACCORD: *In Re Burch)*

In Re Burch, 2010 WL 2889520 (Bankr. D.N.J.) (JHW)

Upon tax sale to tax sale certificate holder, the tax debt was extinguished.

(CONTRARY: *In re Kopec)*

In Re Kopec, 11-27574, KCF 2012

Holder of a tax sale certificate has a tax claim for purposes of §511, and the interest rate in a Chapter 13 must be determined under New Jersey Law.

(CONTRARY: *In Re Curry, 12-26201 NLW*, 2013.

In re Curry, 493 B.R., 447, 450 (Bankr. D.N.J. May 21, 2013) **(NLW)**

Purchaser of delinquent tax certificate is entitled to interest at rate applicable under New Jersey law. "Congress enlarged the reach of the statute by use of the more expansive term 'creditor'. This strongly suggests that Congress intended that a tax claim could be held by a third party."

In re Princeton Office Park, LP [cont]

In Princeton Office II, Judge Kaplan found that the debtor could raise NJ Tax Sale Law, (N.J.S.A. 54:5-63.1) as an affirmative defense to this tax sale certificate holder's Proof of Claim. Such New Jersey Statute provides in part, that the holder of a tax sale certificate who knowingly charges in excess of the amount permitted, shall forfeit such tax sale certificate to the person that was charged. The Court found that tax sale certificate holder charged an improper and excessive premium which rendered the underlying lien void.

IV. Chapter 13 Debtor Avoidance Powers

In re Roxas, 12-23675 CMG, 2013

In Roxas, debtor filed an adversary proceeding against the first mortgagee to determine validity, priority, or extent of lien, asserting that the mortgage note and other related closing documents were improperly notarized, rendering the lien void. Judge Gravelle, in analyzing case law relating to a Chapter 13 debtor's right to exercise Trustee avoidance powers, followed the growing number of Courts finding that debtors do not have standing to bring an avoidance under §544.

V. PROJECTED DISPOSABLE INCOME /SSI

Drummond v. Welsh (In Re Welsh), 711 F33d 1120,1131-35 (9th Cir. Mar. 25, 2013) (Ripple, Trott, Paez)

Social Security income is not included in the calculation of projected disposable income nor are payments on account of secured debts for a debtor with CMI greater than applicable median family income; good faith is not a back door for bankruptcy court discretion with respect to income excluded from CMI or expenses allowed by §707 (b)(2)(A)(iii)

Mort Ranta v. Gorman, 721 F.3d 241 (4th Cir. July 1, 2013) (Gregory, Agee, Faber)

For debtors with CMI above and below applicable median family income, Social Security income is excluded from projected disposable income but can be considered to determine feasibility.

VI. RELIEF FROM CONFIRMATION ORDER

*In Re Rodriguez, No. 12-2146, 2013 WL 1716110, at *1-*4 (3d Cir. Apr. 22, 2013) (unpublished)*

(Stapleton, Alito, Shadur), *Branchburg Plaza Associates, L.P. v. Fesq* (In Re Fesq.), 153 F.3d 113 (3d Cir. Aug, 18, 1998) was not overruled by United Student Aid Funds, Inc., vs. Espinosa, 559 U.S. 260, 130 S. Ct. 1367, 176 L, Ed. 2d 158 (Mar. 23, 2010): bank cannot challenge strip-off of mortgage by Rule 60 motion after confirmation when inadvertence is only ground asserted; fraud is only ground to attack confirmation order under 11 U.S.C. §1330.